

# ALLERGY AND PRODUCTS LIABILITY TODAY

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## THE NATURE OF AN ALLERGIC RESPONSE

To understand the nature of an allergic response<sup>1</sup> is to recognize human fallibility, the basic human idiosyncrasy or peculiar susceptibility of a particular person using a given consumer product—which product is wholly innocuous to the vast majority of normal users. Indeed, it has been often said that there is no product under the sun to which some person, at some time, is not sensitive, whether that product be a common food such as strawberries, eggs, milk, or fruits; a common drug such as aspirin, penicillin or quinine; ordinary cosmetics, whether applied to the face, hands or hair; or even such common everyday occurrences as household dust, feathers, heat, cold, sunlight or what have you. The best true story concerns the young soldier who wears civilian clothes at all times and exhibits a special authorization from his commanding officer—because he is sensitive to the wearing of an army uniform!

The term “allergy” is derived from two Greek words, “allos” or altered, and “ergia” meaning reactivity. Hence, allergy is an altered reactivity of an organism, the environmental modification of a basic change of an organism unable to defend itself against an antigen. If the particular antigen meets the antibody, and if the defense mechanism of the body is incapable of doing its normal job, the body equilibrium is upset, the antigen prevails, and there is an allergic response. In simple terms, the foreign protein which entered the body, did not normally combine with the antibodies or receptors (which the blood cells produce), and neutralize the action of the protein. Therefore, allergy is a deviation from normal adoptive processes.

Allergy may be caused by an infection<sup>2</sup> or by a psycho-traumatic experience, either or both of which, in turn, may be produced by an allergic response. This interrelationship may be described in

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<sup>1</sup> See Freedman, *Allergy & Products Liability* (1961). A number of medical texts dealing particularly with the subject of allergy are available: Alexander, *Synopsis of Allergy* (1945); Cooke, *Allergy in Theory and Practice* (1947); Peria and Mamorsten, *Natural Resistance and Clinical Medicine* (1941); Ratner, *Allergy Anaphylaxis and Immunotherapy* (1943); Sterling, *Clinical Allergy* (1937); Swartz, *How to Master Your Allergy* (1961); Thomas, *Psychocutaneous Medicine* (1935); Vaughan, *Practice of Allergy* (rev. Black 1948); and Wittkower and Russell, *Emotional Factors in Skin Diseases* (1953).

<sup>2</sup> See Allergy Foundation of America, *The Skin and Its Allergies*, (1959).

terms of the "eternal triangle" in the field of allergy, for it explains the interaction between allergy, infection, and the psyche—each may cause the other, and, in turn, be caused by each other. Thus, allergy may be *acquired* because of worry and emotional stress, possible diet deficiencies, malfunctioning or readjustment of endocrine glands, abnormal systematic conditions of the skin or liver, or by such external factors as high temperature, humidity, and the like, in combination with these causes. In addition, heredity plays a prominent role in the development of allergic responses.<sup>3</sup>

All known allergies are said to gain access to the body by being: swallowed, such as foods; inhaled, such as air or dust; injected, such as drugs or serum; or by contact with the skin, such as cosmetics. The most common allergy in the United States results from inhalation, i.e., hay fever and asthma, while food allergies run a close second.<sup>4</sup>

The allergic response or sensitivity can be better understood by a recognition of three of its better known phenomena. Since allergy is an altered capacity of an organism to react, it presupposes a previous sensitization, a prior exposure to an offending substance or substances. Cross-sensitization is the appropriate medical terminology whereby a person reacts today to a substance chemically related to another substance to which he had been previously sensitized. Proof of prior contact<sup>5</sup> with that chemically related substance is therefore

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<sup>3</sup> The United States Public Health Service (Publication No. 168) in 1959 pointed out, for example, that heredity plays a decisive part in the development of allergic diseases: "Many people with allergies have come from families where the parents or other close relatives have had some form of allergic manifestation. Although people do not inherit a specific disease such as hayfever, they do inherit the tendency to become sensitive to certain things. Members of the same family who have inherited such a tendency, may develop altogether different allergic diseases, or they may go through life without a symptom."

<sup>4</sup> *Ibid.*

<sup>5</sup> The process has been likened to the process of immunization to an infectious disease: Horowitz, "Allergy of the Plaintiff as a Defense in Actions Based upon Breach of Implied Warranty of Quality," 24 So. Calif. L. Rev. 221, 224 (1951): "The theory of immunization, e.g., to typhoid, is to introduce a small quantity of the disease agent into the human body; antibodies are formed by the body to combat the infectious disease, and these antibodies remain in the bloodstream or elsewhere to fight off any future invasions by the same disease agent. The allergic diseases are similar in process, in that the body becomes sensitized by introduction into the body of some foreign agent—not necessarily toxic in nature—perhaps a synthetic chemical in a fingernail preparation, or a chemical in a dye, or a protein in a food, or the like—the sensitization coming about by the formation of antibodies, by the body to cope with the presence of the foreign agent. Once the body has become sensitized to a particular foreign substance, upon exposure again to the same foreign substance a violent reaction occurs—between the foreign substance itself, called an antigen, and the antibodies which were formed upon first exposure to that antigen. The results of the antigen—anti-

a requisite in the defense of the products liability claim. However, too frequently the villain who took the "first bite" goes "scot-free," and culpability is mistakingly placed upon the innocuous product nearest in time to the "second bite" which immediately preceded the allergic response.<sup>6</sup> Sensitivity or sensitization is generally a transient, temporary experience. A given person may be sensitive to a given substance today, but not necessarily next week or next month. A person may react favorably or unfavorably to the product at a given time, depending upon such factors as systemic, physiological changes, emotional stability, including aging, or simply an exposure to infection. The use of several substances together or in combination can create an allergic susceptibility, whereas each substance separately does not. Furthermore, sensitivity to one substance can increase the allergic response to a number of other, hitherto innocuous, substances.<sup>7</sup>

It must, of course, be understood that sensitivity is not always the competent producing cause of dermatitis, for mistreatment and misuse of a product, contrary to the directions for use of the product, cannot be overlooked.<sup>8</sup> Also, an allergic response must be differentiated from the reaction of a primary irritant, which is largely unrelated to individual tolerance and which is expected to occur in a high percentage of normal persons exposed to the given irritant under the same conditions for the same period of time.<sup>9</sup> There can be no question

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body biochemical reaction—hay fever, asthma, skin diseases—are the symptoms that make up one or another of the various allergic diseases."

<sup>6</sup> Note, that Ohio has a two-year statute of limitations for bodily injury which begins to run either at the time the injury was inflicted, or at the time the injured party could bring the action. See *Brush Beryllium Co. v. Meckley*, 284 F.2d 797 (6th Cir. 1960).

<sup>7</sup> Although defendant has a right to have a physical examination of plaintiff made by a competent doctor of defendant's own choice (*Easterday v. Melhuish*, 167 N.E.2d 789 (1959)), the physical examination months after the onset of the allergic response will seldom show anything medically or legally significant.

<sup>8</sup> See 163 *Journal of the A.M.A.* 740 (1957), wherein Dr. Carl T. Nelson of Columbia University College of Physicians and Surgeons declares: "Allergic skin conditions are common and plague people the world over. They constitute a large part of the skin complaints for which the patients seek advice from doctors. But keep in mind that your skin blemish may just as likely not be on an allergic basis. There is no good ground for believing that acne (pimples) is caused by allergy. The mystery of psoriasis (skin disease consisting of an eruption of circumscribed rounded patches of a red color covered with adherent white scales, occurring chiefly on the extensor surfaces of the elbows and knees, the scalp, and the back) has not been unravelled, but it is unlikely that allergy is the explanation. Numerous cases of dermatitis are due not to allergy but to mistreatment of the skin with alkalis, acids, other chemicals, mineral oils, rough materials, etc."

<sup>9</sup> In *Patterson v. George H. Weyer, Inc.*, 189 Kan. 501, 370 P.2d 116 (1962), a

of the liability of the manufacturer knowingly selling a product containing a known primary irritant which injures the consumer.

#### UNFORESEEABILITY OF THE ALLERGIC RESPONSE

Since it is obvious that no person (much less the product manufacturer, the distributor, or the retailer) can foretell whether or not a given purchaser will react allergically to a given product, it is axiomatic that the allergic response is an unpredictable occurrence, over which neither the manufacturer, distributor, or retailer have any control. Indeed, the allergic response is legally non-foreseeable. It is the "exception to the general rule,"<sup>10</sup> according to the Massachusetts Supreme Judicial Court in 1960. In *Kinhead v. Lysol, Inc.*<sup>11</sup> the New York Appellate Division ruled that the manufacturer, *as a matter of law*, did not have to anticipate an injury produced solely because of allergy. The court properly pegged the defect in the unusual plaintiff rather than in the product.

The U.S. Department of Health, Education and Welfare in 1959 also pointed up the unpredictability of the allergic reaction:

There is much to be learned about the reason a person suddenly becomes allergic to something which has previously been harmless to him. It has been noted that at times an allergy to a certain food has made its first appearance following an occasion when the food has been eaten in excess. Too, it is known that worry and other forms of emotional stress have caused allergies to flare up. In some cases, the appearance of an allergic illness is due to disturbances inside the body rather than to outside irritants such as pollens. The sensitivity may be associated with bacterial infection, especially of the sinuses, nose, or throat.<sup>12</sup>

But there are predictive techniques and procedures<sup>13</sup> which medical scientists have developed to ascertain whether or not a given person may be sensitive to a given product. The prophetic patch or skin test, the repetitive patch technique, and the repeated insult technique of Draize and Shelanski are but examples of tests on human beings. Preceding these human predictive testing procedures may be the Landsteiner-Jacobs guinea pig tests to evaluate

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permanent wave lotion allegedly caused "a chemical burn" which plaintiff's physician characterized as "a chemical trauma." The Supreme Court of Kansas agreed that the evidence was "reasonably sufficient for the jury to have found plaintiff to be free from any allergy."

<sup>10</sup> *Casagrande v. F. W. Woolworth Co.*, 340 Mass. 552, 165 N.E.2d 109 (1960).

<sup>11</sup> 250 App. Div. 832, 296 N.Y. Supp. 461 (1937).

<sup>12</sup> *Supra* note 3.

<sup>13</sup> See generally Rostenberg, "Predictive Procedures for Eczematous Hypersensitivity," 20 AMA Arch. Indust. H. 181 (1959).

chemicals of unknown sensitizing capacity. However, even these scientific advancements cannot foresee or predict a given allergic response in a given person to a given product at a given time.

### IS THERE AN IDENTIFIABLE "CLASS" OF ALLERGIC USERS?

Since the allergic response is unpredictable as to a given person, recognition of that allergic consumer as a member of a "class" entitled to special legal protection is precluded. Furthermore, a substance or a product which is an allergen must affect a substantial portion of the population—that portion whose total of resistance factors is such that they will exhibit sensitivity to the given substance or product. Thus, the allergic user of a product which is wholly innocuous to the normal user is not entitled to privileged treatment: even breach of warranty demands only *reasonable* merchantability and *reasonable* fitness for particular purpose. The Massachusetts Supreme Judicial Court in the *Casagrande* case expressly declared that the implied warranty of merchantability of goods is simply that they are:

. . . *reasonably suitable* for the *ordinary uses* for which goods of that description are sold when used in accordance with adequate warning and instructions. . . . Fitness for use by a *normal* person is a test often stated. . . . The general knowledge of allergies, however, of which we take notice, and which is reflected in the testimony, makes it unreasonable to infer from any part or parts of the evidence that a significant number of other persons would have been hurt by the deodorant. An inference of fact that the product would have hurt "normal" persons may not be drawn from the evidence of an allergic reaction in one person who has not previously shown sensitivity.<sup>14</sup> (Emphasis added.)

A federal court in Massachusetts similarly found that the allergic consumer of a household disinfectant did not belong to any group of "some" size to be protected. The product manufacturer could be found to be negligent only for harm caused a *normal* person, there being no direct evidence that the product was "harmful" to anyone except the plaintiff.<sup>15</sup> The Utah Supreme Court has summarized:

<sup>14</sup> *Casagrande v. F. W. Woolworth Co.*, *supra* note 10, at 555-556, 165 N.E.2d at 111-112.

<sup>15</sup> *Cumbert v. Household Research Corp.*, 145 F. Supp. 782 (D. Mass. 1956). In *Payne v. R. H. White Co.*, 314 Mass. 63, 49 N.E.2d 425 (1943), the highest Massachusetts court pointed out that plaintiff must show that the dress (which allegedly caused an allergic response) was unfit to be worn by a *normal* person, and that she may not recover by merely showing that it was unfit for her or for some unusually susceptible person to wear. It is to be noted that the court held that, in the absence of evidence that plaintiff was or was not a person whose skin was only normally sensitive to infection or irritation, the jury could find her normal in this respect.

We therefore have the question as to whether a manufacturer who places the product on the market, knowing that some unknown few, not in an identifiable class which could be effectively warned, may suffer allergic reactions or otherwise stated injuries not common to the ordinary or normal person, must respond in damages. Although there is authority to the contrary, we think that the prevailing and better rule is that the injury is caused by the allergy or unusual susceptibility of the person and not by the product.<sup>16</sup>

The language of Section 601(a) of the Federal Food, Drug and Cosmetic Act defines an adulterated cosmetic product as one containing "any *poisonous or deleterious* substance which *may* render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual." (Emphasis added.) Indeed, an allergen is NOT a "poisonous or deleterious substance<sup>17</sup>"; nor is an allergic response a condition of use as is

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<sup>16</sup> *Bennett v. Pilot Products Co.*, 120 Utah 474, 235 P.2d 525 (1951). Here plaintiff, a beautician, in the course of her work in the beauty salon, applied defendant's permanent wave lotion (containing ammonium thioglycolate) to patron's hair, along with a powder fixative (containing potassium bromate.) According to defendant manufacturer's instruction, the two products were to be applied with bare hands, and the whole hair-waving process was controlled by an electric dryer. After seven or eight weeks' use of the lotion, plaintiff's hands became blistered and "inflammation appeared between her fingers" which soon spread to her arms and shoulders. Her physician diagnosed the condition as an allergic contact dermatitis, not due to the lotion or fixative separately, but to the mixture of both, which fact patch tests subsequently confirmed. Plaintiff was compelled to terminate her occupation as a beautician. In her action against the manufacturer she alleged both breach of warranty and negligence in distribution of the product without warning, but the warranty count was abandoned at pre-trial. The Utah Supreme Court in affirming the non-suit, found no evidence which would render reasonably foreseeable to the manufacturer the peculiar sensitivity or idiosyncrasy of plaintiff.

<sup>17</sup> In *Cleary v. John M. Maris Co.*, 173 Misc. 954, 19 N.Y.S.2d 38 (Sup. Ct. 1940), a certain metallic nipple shield purchased by the mother allegedly caused metallic poisoning of the infant through possible ingestion. Since thousands of such shields had been used for years without harm, and the manufacturer and retailer had no knowledge that the shields were dangerous, the New York court, in dismissing the complaint on its merits, said:

It is a matter of common knowledge that many persons are allergic to conditions which do not affect the normal individual. Cases so holding are legion with reference to wearing apparel, cathartics, face powders and sedatives. In this state it has been held that "preparation is not deleterious to human health, in the ordinary acceptance of that term, simply because one person in a multitude of those using it happens to meet with ill effects from taking it." . . . How from the evidence before this court can it be determined whether or not this infant was the subject of a peculiar hypersensitivity to the almost insignificant lead deposits (if there were any) upon the mother's breasts? It is the plaintiff upon whom rests the burden of proving this case by a fair preponderance of the evidence. Prior to

"customary or usual."<sup>18</sup> Drug products under Section 502(f) of the Act are required to be labeled so as to appropriately warn against *known dangers* in method of use or quantity of dosage. Surely no one would contend that every manufacturer must warn about a potential allergic response in that particular, susceptible individual, simply because, as Dr. Harry Swartz expressed it, "Everybody is a candidate for allergy and 50% of the population actually suffer from allergy in one form or another today."<sup>19</sup> Indeed, it can be substantiated that there is no limited class of natural or artificial substances which possess a unique capacity to harm allergically a given user; nor is there a limited class of allergic users who will react adversely to natural or artificial substances.<sup>20</sup>

To impose liability without fault upon the manufacturer for any allergic response is to make the manufacturer the insurer of every purchaser and user of the product. There is no product to which some person at some time is not sensitive! If every product carried a caution about possible allergic responses, what economic justification would there be for such warnings when the purchaser is ordinarily unaware of his peculiar susceptibility until he has used the product! Legally, such a warning would provide the requisite notice of potential allergic response which would pertain to an infinitesimal part of the population. The reputable manufacturer who does warn may find himself at a severe disadvantage with competitors who label their products without any warning, in the hope of improving their competitive sales position. Then again, the warning itself may generate more liability, for it constitutes an admission of knowledge of danger,

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the time that this infant became ill there was no way of determining whether the infant would, by some idiosyncratic reaction, respond to the infinitesimal quantities of lead which it is claimed were ingested with each feeding and extending over this six or seven months' period. 173 Misc. at 956, 19 N.Y.S.2d at 42.

<sup>18</sup> See *Ross v. Porteous, Mitchell & Braun Co.*, 136 Me. 118, 122, 3 A.2d 650, 653 (1939):

The implied warranty of the statute that goods sold for a known particular purpose "shall be reasonably fit for such purpose," measures the buyer's right of recovery, and the seller's liability. It is accordingly held that in the sale of wearing apparel, if the article could be worn by any normal person without harm and injury is suffered by the purchaser only because of a supersensitive skin, there is no breach of the implied warranty of reasonable fitness of the article for personal wear.

<sup>19</sup> Swartz, *How to Master Your Allergy*, (1961).

<sup>20</sup> In *Jacquot v. Wm. Filene's Sons Co.*, 337 Mass. 312, 149 N.E.2d 635 (1958), plaintiff was unable to show that she was "one of a class of persons sensitive to the fingernail kit to whom the implied warranty of fitness for purpose might extend." Even her dermatologist had testified that he "had not seen any case of such sensitivity."

and must therefore stand the test of "sufficiency" and duty to warn as in the *Braun* and *Wright* cases, hereinafter discussed.

Of course, the reputable manufacturer will have rigorously and carefully conducted technical and medical testing of his product in advance of marketing.<sup>21</sup> He will ascertain whether his product will evince any allergic response in a substantial number of users. He will determine the hypoallergenic combination of ingredients, eliminating those ingredients which have a high incidence of allergic responses in tested persons. The reputable manufacturer will also keep abreast of medical literature on allergy.

#### ALLERGY

A tort action against the manufacturer for damages resulting from an allergic response, must encounter these basic considerations:<sup>22</sup> unforeseeability of harm, whether a reasonable person should have anticipated an allergic response from ordinary, normal use of the product; adequacy of notice, whether the label and/or written instructions for use warn or caution the user about a potential allergic response and whether such warning is necessary at all; lack of proximate cause, whether the allergic response was proximately caused by the particular product, or was engendered by some other food, drug, cosmetic, chemical or other consumer product; and assumption of risk, whether the user was aware of his prior sensitization, known idiosyncrasy or peculiar susceptibility to the particular product.

##### *Unforeseeability of Harm*

An allergic response is generally held not to be within the zone of foreseeability, as illustrated by the Utah Supreme Court in *Bennett v. Pilot Products Co.*:

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<sup>21</sup> In *Wahlstrom Optical Co. v. Miller*, 59 S.W.2d 895 (Tex. Civ. App. 1933), the buyer of eyeglasses sued in negligence to recover damages for allergic injuries resulting from his use of the eyeglasses. There was expert testimony that the dye on the eyeglass frame would not injure an ordinary person, that it was most unusual for it to cause any ill effects, and that the injury in this case was caused by the idiosyncrasy of the buyer's skin. The Texas court held that the buyer had failed to show either actionable negligence, or that such negligence was the proximate cause of the injury. It appeared that the only way in which the seller could have discovered the idiosyncrasy of the buyer's skin was by testing the buyer for a period of two or three days before the sale! The court was of the opinion that the seller was under no duty to make any such test to ascertain whether the buyer was of the ordinary type which the dye would not affect, or to foresee that her skin would be peculiarly susceptible to the dye of the frames.

<sup>22</sup> "In negligence cases, duty is an obligation, recognized by the law, to conform to a particular standard of conduct toward another. The plaintiff must be within the class of persons to whom the duty is owed, and no action may be founded upon a duty only to others. The prevailing view is that there can be no duty to one toward whom no danger may reasonably be foreseen." Prosser, *Torts* 36 (2d ed. 1955).



Appellant appeared to be sensitive to the mixture (permanent wave lotion) much the same as some people respond to strawberries—a commodity honored so frequently by the authorities in illustrating difference in liability to the allergic in contrast to the normal individual. We believe, that under the facts of the case, the trial judge strained neither common sense nor realism in concluding that appellant's ailment, being the result of an allergy, was not compensable as a matter of law. We are sympathetic with appellant and her misfortune, but cannot require the merchant to assume the role of absolute insurer against physiological idiosyncrasy. To do so also would invest the elusive ordinary prudent man with a quality of foreseeability that would take him out of character completely. Every substance, including food which is daily consumed by the public, occasionally becomes anathema to him peculiarly allergic to it. To require insurability against such an unforeseeable happenstance would weaken the structure of common sense. . . .<sup>23</sup>

A New York appellate court in *Lehner v. Procter & Gamble Distr. Co.*<sup>24</sup> specifically held that a manufacturer cannot be held liable for negligence in the manufacture of a product in the absence of "proof of knowledge by defendant of potential danger to a number of persons in using its product." It was determined that the plaintiff "did not establish that the product was harmful or inherently dangerous"; and, "mere redness of hands acquired by a small percentage of those tested by the defendant unassociated with any form of dermatitis" is insufficient "by itself to put defendant on notice of possible danger to users of its product."

#### *Duty to Warn or Inadequacy of Notice*

Is there a duty on the part of the product manufacturer to warn of a possible allergic response to the given product? Admittedly, the duty to warn about defective wheels or contaminated substances is totally different from any possible duty to warn about a substance which may or may not produce an allergic response in a given person. Cause and effect of an allergic response, for example, are not open

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<sup>23</sup> *Bennett v. Pilot Products Co.*, *supra* note 16, at 477-478, 235 P.2d at 527. Note *Baker v. Stewart Sand & Material Co.*, 353 S.W.2d 108 (Mo. 1961) wherein liability was not imposed upon a manufacturer of ready-mix concrete for dermatitis contracted by a user, because the product was a standard mixture and the cement met all standard specifications.

<sup>24</sup> 208 Misc. 186, 143 N.Y.S.2d 172 (Sup. Ct. 1955). In *Kinthead v. Lysol, Inc.*, 250 App. Div. 832, 296 N.Y. Supp. 461 (1937), the New York court declared: "If she used it [Lysol disinfectant] diluted as prescribed, it did her harm only because of the allergy, and I am holding that is something the manufacturer does not have to anticipate within the law of negligence."

<sup>25</sup> 240 Minn. 71, 59 N.W.2d 207 (1953). See *Pinto v. Clairol* (Civil No. 4239) D.C.W.D. Ky., May 2, 1962 (jury verdict on issue of adequacy of labeling and instructions; also no proof of deleterious substance).

to convincing proof under the present state of scientific-medical knowledge. No qualified allergist nor dermatologist will risk his reputation on even the medical cause (much less the legal cause) of a given allergic response without having made a series of prophetic patch tests with the given substance, taken a complete medical history of the patient, and included, by similar testing, other known antigens.

Products labeled in conformity with the Federal Food, Drug and Cosmetic Act have presumably given proper notice to the user of any known, untoward result. Probably the strangest case to the contrary was *Schilling v. Roux Distrib. Co.*<sup>25</sup> wherein the Minnesota Supreme Court gave the hair tint manufacturer a verbal spanking by holding literally that the words, "each and every application" (in the patch test instructions for the hair tint) did not include both a full head application and a retouch application of the hair tint. Such ultra-literal interpretation, it is submitted, is contrary to technical and industry usage as well as to the common understanding of people everywhere. The court's definitive reference was to the user's failure to make the requisite preliminary patch or skin test for hypersensitivity before each retouch application.

#### *Proximate Cause*

The causal relationship between the use of a given product and the allergic response is a prerequisite to an action for negligence as well as to breach of warranty action. The susceptible plaintiff must prove that the given product, and not another product or substance, actually and proximately caused his allergic response. The plaintiff carries the burden of exclusion and, only after the allergen is accurately isolated and confirmed by patch-testing (as well as by discontinuance of the use of the product) can the given product be incriminated.

Causation, based upon exclusion, had been rigorously asserted by the highest New York court almost 35 years ago.<sup>26</sup> The New York Court of Appeals furthermore pointed out the necessity for proof that the product was inherently dangerous or deleterious before any inference or presumption could be justified as to proximate cause of the allergic response. Thus, where the injury was of an allergic nature, the inference or presumption does not apply unless plaintiff has *excluded* all other causes except the application or use of defendant's product.<sup>27</sup> The court here found that the evidence did not justify

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<sup>26</sup> *Karr v. Inecto, Inc.*, 247 N.Y. 360, 160 N.E. 398 (1928).

<sup>27</sup> For a listing of data necessary for evaluating medico-legal aspects of specific

a finding that the hair tint product was inherently dangerous, but indicated that, in any event, the proof of causal connection in this area would have to be particularly clear to justify a verdict under any circumstances, that is, even if negligence could somehow be shown. Although this case has been criticized as confusing the dangerous instrumentality rule with proximate cause, the decision is perfectly clear in spelling out the sentiment of the court that the allergic plaintiff should be held to the most precise medical evidence of causal relationship.<sup>28</sup> *Fein v. Bonetti*,<sup>29</sup> decided in 1954, again involving a hair dye, had the benefit of a medical opinion that defendant's product caused the allergic injury, but the expert conceded that other substances used by the plaintiff might have caused 'a similar set of symptoms. Following the rule in *Karr v. Inecto*, the New York Court of Appeals reversed a verdict in plaintiff's favor and held that plaintiff's evidence was not sufficient to go to a jury.

In *May v. Ferrantelle*,<sup>30</sup> the plaintiff allegedly sustained an allergic response due to an application of a coal tar hair dye by the defendant beauty salon. Admittedly, the defendant had failed to make the preliminary patch or skin test for hypersensitivity, as required by the instructions which accompanied the product, and under New York City and State statutes.<sup>31</sup> But, despite the statutory violation,

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sensitivities, see Schwartz, "Problems of Proof in Claims for Recovery for Dermatitis," 41 Mich. L. Rev. 893 (1943).

<sup>28</sup> See Nelson, "Clinical Appraisal of Dermatoses Due to Cosmetics," 163 A.M.A.J. 740-741 (1957); "Incidentally, when taking a history with a view to eliminating cosmetics, it is surprising how many patients do not consider wave set, shampoo, toothpaste, mouthwash, cologne, toilet water, and hand cream to be cosmetics. Once the diagnosis has been determined, it may be confirmed by selective patch testing, or, better still, by producing some recurrence of the dermatitis through limited reuse of the suspected cosmetic."

One of the most important recent cases on proof of causation by medical testimony is *Miller v. National Cabinet Co.*, 8 N.Y.2d 277, decided by the New York Court of Appeals on July 8, 1960. Here a workman's compensation death award had been made to the widow of a man who admittedly died from leukemia. The theory of liability was that this blood disease was caused by his exposure to benzol contained in varnish removers which the decedent used in his employment as a piano finisher. The workman's compensation referee appointed an industrial hygiene physician to investigate and he reported: "As this disease is one in which there is no known cause, and there are no known substances used in any of these work places which produce symptoms and signs similar to the signs and symptoms of this leukemia—an investigation is not able to disclose any casual relation." Accordingly, the referee disallowed the claim, but the Board reversed, on appeal. The highest New York court reversed and dismissed the claim in a lengthy opinion citing as a "serious defect in claimant's case" the fact that the "causes of leukemia or its aggravation are unknown."

<sup>29</sup> 307 N.Y. 682, 120 N.E.2d 854 (1954).

<sup>30</sup> N.Y. Sup. Ct., N.Y. County, Dec. 8, 1959.

<sup>31</sup> Section 131 of the Sanitary Code of the City of New York (now Section 77.01(1)

plaintiff's motion for summary judgment was denied because of lack of proof of proximate cause. According to Mr. Justice Lupiano:

The physician examining the plaintiff on behalf of the defendant states that, in addition to the use of the hair dye, plaintiff's hair was shampooed, bleached, and set and other substances were used in the course of the process. Allergy to either the bleaching preparations, the shampoo, the hair dye, or the materials used in the setting of the hair could produce physical conditions to be observed which could be identical, and one could not tell with reasonable medical certainty, from mere observation of the condition, which of the substances had been the cause of the reaction. The causative factor is therefore in issue. . . .

Similarly, in *Hanrahan v. Walgreen Co.*<sup>32</sup> the North Carolina Supreme Court found that the plaintiff's dermatologist had made no chemical analysis of the product, was not familiar with the ingredients of the product, and had not confirmed his medical opinion by prophetic patch testing with the hair tint. The court said: "The cause of plaintiff's dermatitis remains a matter of doubt and conjecture."<sup>33</sup>

It is obvious that where evidence as to the *cause* of the allergic response is lacking, it is not proper for the jury to speculate on whether or not there was negligence or a breach of warranty.<sup>34</sup>

### *Assumption of Risk*

If a patron or user has a personal idiosyncrasy or peculiar susceptibility to a given product, which fact has not been communicated to the manufacturer, the product manufacturer cannot be held liable for the alleged injury, for the user may be said to have assumed the risk of such use of the product. In *Bennett v. Pilot Products Co.*,<sup>35</sup> the Supreme Court of Utah refused recovery of any damages by a beau-

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and Section 163.09(e) of the New York City Health Code) and Section 6810(1)(a) of the New York State Education Law.

<sup>32</sup> 243 N.C. 268, 90 S.E.2d 392 (1955).

<sup>33</sup> *Id.* at 269, 90 S.E.2d at 393.

<sup>34</sup> See the Ohio Court of Appeals decision in *Leach v. Joyce Products Co.*, 66 Ohio L. Abs. 296, 116 N.E.2d 834 (1952).

<sup>35</sup> *Bennett v. Pilot Products Co.*, *supra* note 16.

Note *Westinghouse Electric & Mfg. Co. v. Deakins*, 305 Ky. 385, 390, 204 S.W.2d 434, 437, (1947). On the question of assumed risk where a female employee with acne continued to immerse her hands in a solution which aggravated her condition:

We conclude, therefore, that the defendant violated no duty which it owed to the plaintiff, and while there might have been a recurrence of the malady, aggravated by the dangers of the work, the knowledge of her sensitive skin and pre-existing condition, coupled with her knowledge of the effect on the skin of other employees, places the responsibility upon her and not upon the Westinghouse Company. The defendant's motion for a peremptory instruction should have been sustained.

tician who sustained dermatitis of the hands following use of a permanent wave preparation on her patron. The beautician was deemed to have assumed the risk by failing to disclose her known sensitivity or idiosyncrasy to the manufacturer (or, in lieu thereof, abstaining from the use of the product) prior to the use of the product in her business.

#### BREACH OF WARRANTY

It is submitted that an unpredictable or unknown pre-existing disposition of a given person to a given product cannot be contemplated by the parties to a contract of sale, and therefore cannot give rise to an implied warranty of merchantability or of fitness for particular purpose. Indeed, it was held by the Tenth Circuit U.S. Court of Appeals<sup>36</sup> that, since "warranties do not extend to injuries caused by peculiar idiosyncrasies or physical condition of a user which are not reasonably foreseeable," no breach of such implied warranties is possible. Similarly, if it is contended that allergenicity is inherent to or natural with the given product, (much like a fragment of a chicken bone has been held natural to chicken pie,<sup>37</sup> or like a broken prune pit is natural to prune butter)<sup>38</sup> then no implied warranty can arise, much less be breached. Otherwise, a manufacturer would become an insurer of his product when his legal obligation is merely that the product should be reasonably merchantable and reasonably fit for its intended use by a normal person. "Merchantability" is "medium quality" or "fair average quality,"<sup>39</sup> and "fitness for particular purpose" is appropriateness for average, normal use, reasonably fit for the general purpose for which it is sold.<sup>40</sup>

A manufacturer may furnish in the product instructions a simple notice to the user, such as "This product, like any product, may evince an allergic response in a susceptible person. If so, discontinue its use." Such a manufacturer may have prejudiced his position by the admission that his product can produce an allergic reaction, even if confined to a susceptible person. A plaintiff sustaining an allergic response would bring himself within the "class" of persons to be protected by the warranty, provided that he had *previously sustained* an allergic response upon first use of the product. The Massachusetts Supreme Judicial Court has said that warranties must be taken with

<sup>36</sup> *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (10th Cir. 1956).

<sup>37</sup> *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 59 P.2d 144 (1936).

<sup>38</sup> *Courter v. Dilbert Bros. Inc.*, 186 N.Y.S.2d 334 (Sup. Ct. 1958).

<sup>39</sup> 35 Ohio Jur. 875 (1934).

<sup>40</sup> *Dunbar v. Consolidated Iron Steel Co.*, 23 F.2d 416 (2d Cir. 1928), *cert. denied*, 277 U.S. 599 (1927), and *Cullen v. Brimm*, 37 Ohio St. 236 (1881).

the product instructions against *continued* use by persons with allergies,<sup>41</sup> and, therefore, failure to cease the use of the product in accordance with instructions accompanying it, would bar a successful action for breach of warranty as well as constitute contributory negligence in a negligence action. Two years later, the same court in *Casagrande v. F. W. Woolworth Co.*,<sup>42</sup> directed a verdict for the retailer of an underarm deodorant upon similar reasoning. The Supreme Court of North Carolina in *Hanrahan v. Walgreen Co.*, summarized the principle:

. . . There is no liability upon the seller, [for an alleged breach of warranty] where the buyer is allergic or unusually susceptible to injury from the product, which fact was wholly unknown to the seller and peculiar to the buyer.<sup>43</sup>

The New Jersey Superior Court also declared that there can be no breach of warranty without proof of *defective* product.<sup>44</sup> And, a product to which a given person is allergic is not a "defective" product. If the product was properly made and is not unreasonably dangerous to the normal, average consumer, the product is not defective! The Supreme Court of Ohio in *Allen v. Grafton*<sup>45</sup> sensibly adopted a "reasonable expectations" test for oyster shells in oysters: what do consumers reasonably expect to find in the product? Indeed, consumers do reasonably expect that some persons at some time may evince an allergic response to a given product! Such a product is not "defective" merely because someone is allergic to it!

#### DEFENSES TO A BREACH OF WARRANTY ACTION

If a breach of warranty action alleging an allergic response is to be successful, the plaintiff must overcome such obvious defenses, among others, as lack of privity contract, including limited extension of the benefits of a warranty to others than the purchaser, written disclaimers of liability, and tort defenses generally.

Privity of contract presumes a *sale* of a product, not the rendering of a *service* by a third party with the product. The application of cosmetic products in a beauty salon, the injection of a prescription drug by the attending physician, or the service of food in a restaurant, except for a statute to the contrary, do *not* give rise to a sale, and hence there could be no privity of contract. Moreover, there

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<sup>41</sup> *Jacquot v. Wm. Filene's Sons Co.*, *supra* note 20.

<sup>42</sup> *Casagrande v. F. W. Woolworth Co.*, *supra* note 10.

<sup>43</sup> *Hanrahan v. Walgreen Co.*, *supra* note 32, at 269, 90 S.E.2d at 393.

<sup>44</sup> *Kaspirowitz v. Schering Corp.*, 70 N.J. Super. 397, 175 A.2d 658 (1961), the product being a medicated prescriptive shampoo.

<sup>45</sup> 170 Ohio St. 249, 164 N.E.2d 167 (1960).

has been little honesty on the part of many plaintiffs' counsels in the rush to discard the doctrine of privity. Today's boxscore would show that 29 states and the District of Columbia still adhere to the necessity for "privity of contract," while only 17 states profess to have abandoned "privity of contract." (Only Alaska, New Mexico, Vermont and Wyoming have no recent decisions on the point.)<sup>46</sup>

The rush to dump "privity" has been evident in Ohio since the *Rogers*<sup>47</sup> decision in 1958. The plaintiff, after having a permanent wave lotion applied to her hair by her mother, found that her hair had assumed a cotton-like texture, had become gummy, and when the curlers were removed, her hair fell off to within one-half inch of her scalp. The plaintiff thereupon brought action against the out-of-state manufacturer for breach of warranty. The Supreme Court of Ohio ruled that privity was not necessary because express representations were made by the defendant manufacturer in his TV advertisements directly into the home of the purchaser, who was induced to purchase the home permanent wave product in reliance upon the express warranty. Plaintiff's hair breakage was therefore compensable; the manufacturer had negligently represented its product to plaintiff's detriment. Note that the product was in fact sold under its patent or trade-name so that an implied warranty of fitness for particular purpose would not exist, and there could be no reliance by the purchaser upon the seller's skill or judgment.<sup>48</sup> Thus, the *modus operandi* for liability was the breach of an "unexpressed" express warranty. Note that the case involved an alleged primary irritant, and not an allergen.

Even the *Greenberg v. Lorenz*<sup>49</sup> decision in 1961 by the highest New York court has not resulted in any clear-cut disavowal of the "privity" doctrine.<sup>50</sup> Indeed, the decision has been subsequently con-

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<sup>46</sup> For an up-to-date compilation, see the author's Defense Research Institute monograph, "Products Liability," (1962), pp. 21-23.

Note two Ohio cases requiring privity of contract, *Steele v. Westinghouse Electric Corp.*, 107 Ohio App. 379, 159 N.E.2d 469 (1958), and *Jordan v. Brower*, 86 Ohio App. 505, 93 N.E.2d 49 (1949).

<sup>47</sup> *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 238, 147 N.E.2d 609 (1958), a 4-3 decision *aff'g* 105 Ohio App. 53, 139 N.E.2d 871 (1957).

<sup>48</sup> It is of interest to note that the Ohio Supreme Court a year later in *Janko v. Roux Distributing Co.*, 170 Ohio St. 48, 162 N.E.2d 124 (1959), affirmed a dismissal of a complaint by a consumer against the manufacturer, because the evidence clearly showed that the consumer, "in the purchase of defendant product, did not do so by reason of any direct representations (or express warranties) of the defendant as to the quality of its product."

<sup>49</sup> 9 N.Y.2d 195, 173 N.E.2d 773 (1961).

<sup>50</sup> See Mr. Justice Hockett's decision in *Samet v. Brestone* (New York City

strued by New York courts as a mere extension of the benefits of warranty to a member of the household of the purchaser<sup>51</sup> and limited to "foods and household goods."<sup>52</sup>

Court, Queens County, May 8, 1961): "There must be a warranty or there is no basis for this action. Neither of these defendants did any wrong. . . . The recent case of *Greenberg v. Lorenz* has no application here. . . . As far as the facts in this case are concerned the law has not been changed. Warranty does not run with the chattel."

On Feb. 22, 1962, the New York Court of Appeals, however, in *Randy Knitwear Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E. 399 (1962), took an independent course with respect to privity of contract. The case involved a \$208,000 property damage claim occasioned by defendant's allegedly false representation of its textile finishing process making a treated fabric unshrinkable. Suit was brought on an *express warranty* against the process manufacturer and against its process licensees who had actually sold plaintiff their own fabrics which they presumably treated with "Cyana Shrinkage Control Finish."

The court merely affirmed the lower court's determination denying American Cyanamid's motion for summary judgment, and did not discuss the case on its merits. The majority opinion remanded the case with a terse statement that it was "impossible to justify the manufacturer's denial of liability on the sole ground of absence of technical privity." Since "privity" is dependent upon a "sale," it is strange that the majority opinion did not identify any "product" sold by American Cyanamid to the plaintiff. Judge Fuld admitted that "the article sold by the appellant, *resin*, is different from that purchased by the plaintiff, *fabric*," but he did not explain just what, if anything, the resin manufacturer had sold the plaintiff!

The truth of the matter is that the product utilizing the Cyana process (a chemical resin) was sold by its licensees to the plaintiff. Hence, the court was in error in assuming that privity applied in the absence of a sale of a product. Judge Fuld also skirted the issue of contributory negligence in use of the process by Fairtex and Apex. Indeed, he proclaimed that Cyanamid has *subsequently* an "appropriate recourse" against them. Why should the resin manufacturer be in the direct line of fire from the purchaser of a fabric which the resin manufacturer did not manufacture?

Thus, it can be only dictum that the privity rule was dispensed with. Indeed, privity of contract is still a prerequisite in New York, for *fabrics* clearly do not come within the limitation of "food and household goods," as set forth in *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d. 773 (1961) which simply extended the benefits of warranties of such products to members of the household of the purchaser. It is of interest to note that in 1960 the Federal District Court in New York in *McDonald v. Blue Jeans Corp.*, 183 F. Supp. 149 denied recovery to a retailer (who had settled with the injured purchaser) against a fabric manufacturer because of lack of privity of contract, in that the material had been purchased from an intermediate distributor. See also, *Deeves v. Fabrics Fire House Co.*, 29 Misc. 2d 136, 210 N.Y.S.2d 903 (Sup. Ct. 1961). Furthermore, the judicially-made exceptions to the privity rule pertain to personal injuries, and do not extend to damages to personal property. *Russell v. Session Clock Co.*, 19 Conn. Super. 425, 116 A.2d 575 (1955), *cf. Amie v. Lame*, 226 N.Y.S.2d 832 (App. Div. 1962). If the instant decision implies a breach of warranty on the part of defendant, then the court should have required proof of a defect in the product sold by defendant. In addition, the court should have viewed evidence of tort defenses, such as possible intervening negligence on the part of the licensees, for if the fabric was not properly treated with the Cyana process, the product sold by the licensees to plaintiff would not be shrinkage-resistant. In the last analysis, this case was actually



The privity requirement indeed gives the product manufacturer a necessary shield against the exaggerated and the fraudulent claim. A high percentage of claims are downright fraudulent or grossly exaggerated. Retention of the privity requirement compels a plaintiff to sue, upon a sale of the product, the immediate vendor, who may, in turn, if warranted, recoup his loss against his distributor and eventually the manufacturer. The accessibility of the product manufacturer has too frequently lightened the plaintiff's burden of proof of "fault," and even encouraged courts to predict liability upon ability to pay.<sup>53</sup>

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determined in tort, *i.e.*, plaintiff's reliance upon defendant's express fraudulent representation in garment tags affixed to the fabric (as held by the concurring opinion of Judge Froessel), and therefore the majority opinion's attack upon the privity doctrine was unnecessary.

Also note *Thomas v. Leary*, 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (1962), on a dealer's liability for a defective chair sold to a dentist. The dental technician was injured when the chair collapsed. Recovery against dealer upheld upon breach of implied warranty.

<sup>51</sup> In *Anderson v. Radio Corporation of America*, 211 N.Y.S.2d 337, the New York Supreme Court, Nassau County, on October 26, 1961, declared:—"Although recently in *Greenberg v. Lorenz* it was held that not merely the individual buyer but all the members of a household benefit by a warranty as to food and household goods, it has not been held that a buyer or member of his household may sue a manufacturer with whom the buyer had no contract. . . ." (Emphasis added.)

On the necessity for privity of contract to support a cause of action for warranty, see the following recent New York cases: *Colonial Boiler Service Inc. v. Blau*, New York Supreme Court, Bronx County, Apr. 19, 1961; and *Monac v. Chrysler Sales Corp.*, 191 F. Supp. 648 (S.D.N.Y. 1961). Also, note *Ciociola v. Delaware Coca-Cola Bottling Co.*, 172 A.2d 252 (Del. 1961); *Albin v. Illinois Crop Improvement Assn.*, 30 Ill. App. 2d 283, 174 N.E.2d 697 (1961); and *Prince v. Smith*, 254 N.C. 768, 119 S.E.2d 923 (1961).

<sup>52</sup> For example, *Rypins v. Rowan*, 219 N.Y.S.2d 288, in which the New York Supreme Court, Nassau County, on September 9, 1961, refused to include combination screen doors within the definition of "household goods." In *Levitt v. Ford Motor Co.*, 215 N.Y.S.2d 677, 679 (1961) the New York Supreme Court, Queens County, excluded automobiles from the impact of the *Greenberg* case, and declared: "As the law presently stands, it does not appear that the *Greenberg* case has abolished, with respect to all forms of merchandise, the ancient doctrine that privity of contract is necessary to support an action for breach of warranty." After the *Randy Knitwear* decision, *supra* note 50 the complaint was amended to include breach of warranty.

<sup>53</sup> See *Simmons v. Wichita Coca-Cola Bottling Co.*, 181 Kan. 35, 309 P.2d 633 (1957). The action in warranty by a remote vendee against the bottler involved a book of matches in a bottled beverage. Defendant's appeal was based on the exclusion by the trial court of certain of its evidence. Defendant had sought to show the care used in its washing and bottling operations. It had also sought to introduce a series of experiments conducted by its chemist which tended to prove that a book of matches could not survive those operations. The trial court refused to admit any of this evidence, and this action was affirmed on appeal. The court was fully aware that defendant's

In May 1960, almost two years after the *Rogers* decision, the Ohio Court of Appeals in *Kennedy v. General Beauty Products, Inc.*<sup>54</sup> expressly ruled that the *Rogers* case had not modified the prevailing Ohio principle enunciated in *Wood v. General Electric Co.*<sup>55</sup> that "no action may be maintained against a manufacturer for injury, based upon implied warranty of fitness of the article so furnished" in the absence of privity of contract. Judge Skeel solemnly declared: "Until the *Wood* case is modified, it is our duty to follow the law as there set out." In effect, the defendant, in the sale of the hair dye, only had a duty to see that the product sold would not be dangerous to a normal

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evidence was offered to prove that it did not breach its warranty. However, in that connection, the court said: "In order for defendant to avoid liability under its warranty, it must show who contaminated the beverage and not merely that the defendant itself did not." This shocking revelation that a defendant is guilty until he proves himself innocent, *i.e.*, he must prove the guilt of another to exonerate himself, explains why manufacturers must fight to retain the privity requirement! How else can the manufacturer be assured that the court will accept his defense? In effect, the Kansas Supreme Court imposed "liability without fault."

<sup>54</sup> 112 Ohio App. 505, 167 N.E.2d 116 (1960). Initially the *Rogers* case received the plaudits of a federal appellate court in *Arfons v. E. I. duPont and Ensign-Bickford Co.*, 257 F.2d 434 (2d Cir. 1958). Plaintiff was severely injured while working with duPont dynamite, which had a fuse manufactured by Ensign-Bickford. The accident presumably occurred in Ohio (although this was not indicated in complaint). Arfons sued both duPont and Ensign-Bickford in a federal district court in Connecticut where defendant Ensign-Bickford was doing business, and his complaint based on breach of warranty was dismissed upon the ground that under Ohio and Connecticut law, recovery was not possible because of the absence of privity of contract between Arfons and the two companies. On appeal, Arfons asked for a reversal of the dismissal on the strength of the Ohio Supreme Court's decision in the *Rogers* case which apparently did not require privity of contract. The court agreed and remanded the case for a trial; holding that if, under any reasonable reading, the complaint states a claim upon which relief can be granted, the court must allow the case to be heard. Express warranties were evident in advertisements and literature that the products were safe for the purpose for which they were sold when used in accordance with instructions. Since the injury *probably* occurred in Ohio, it is conceivable according to the court, that the Connecticut choice of law would require the application of Ohio law which no longer seemed to require privity of contract in warranty actions.

<sup>55</sup> 159 Ohio St. 273, 11 N.E.2d 8 (1953). This case involved the purchase of an electric blanket from an independent dealer. The blanket was used by the purchaser for approximately two months, and then it was noticed that the blanket was smoldering in three or four spots. The blanket was taken from the bed and carried out of the bedroom. Later, it was discovered that the mattress on the bed was on fire. The mattress fire could not be extinguished, and considerable damage resulted to the premises. In discussing the question of implied warranty, the Ohio Supreme Court definitely ruled that there must be contractual privity between the seller and buyer, and that, although a subpurchaser of an inherently dangerous article may recover from the manufacturer, no action may be maintained against such manufacturer by the subpurchaser based upon implied warranty of fitness of the article so purchased.

person, if and when used in the manner as directed by the instructions. Here was an appeal from a jury verdict denying recovery to the plaintiff against the cosmetic manufacturer. The plaintiff had assigned as error the trial court's refusal to instruct the jury as to the warranty of fitness running against the remote manufacturer. Judge Skeel tersely declared that, "There is no claim in this case of privity . . . (the facts make privity impossible) . . . ." <sup>56</sup>

The benefits of a warranty are generally available only to the immediate purchaser who is in privity with the seller. The purchaser's spouse, children, employees, and others in close relation to him, have been held to be outside the protection of such a warranty. <sup>57</sup> Courts have, however, implied the existence of an "agency" and "third party beneficiary" relationship, in order to circumvent the unjust discrimination against such known non-purchasers as members of the family or household injured by the use of the product. The result has been an extension of warranties, by statute such as Sec. 2-318 of the Uniform Commercial Code, which extends the warranty to "any natural person who is in the family or household of his buyer, or who is a guest in his home, if it is reasonable to expect that such person may use, consume, or be affected by the goods, and who is injured in person by breach of the warranty." <sup>58</sup>

In October 1961 the Connecticut Supreme Court extended the benefit of implied warranties to a remote user of a household detergent that spilled upon the user. <sup>59</sup> Both the manufacturer and the retailer demurred to the allegations of breach of certain express and implied warranties derived from radio, television, and newspaper advertisements, upon the ground that there was "no privity of contract nor any sale between them and the named plaintiff," which demurrer the trial court sustained. Associate Justice Murphy, on appeal, found error, set aside the judgment for the defendants, and remanded the

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<sup>56</sup> *Id.* at 508, 167 N.E.2d at 119.

<sup>57</sup> In both *Zampino v. Colgate-Palmolive Co.*, 8 App. Div. 2d 304, 187 N.Y.S.2d 25 (1959), complaint dismissed by New York Court of Appeals (1960), and in *Greenberg v. Lorenz*, 7 App. Div. 2d 968 (1959), the New York courts refused to extend the warranty to plaintiff's husband and plaintiff's daughter, respectively. (The *Greenberg* case was subsequently reversed on appeal, 9 N.Y.2d 195, 173 N.E.2d 773 (1961).)

<sup>58</sup> As of January, 1964, twenty-eight states will have adopted the Uniform Commercial Code. They are: Alaska, Arkansas, California, Connecticut, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, West Virginia, Wisconsin, and Wyoming.

<sup>59</sup> *Hamon v. Digliani*, 149 Conn. 710, 174 A.2d 294 (1961).

case accordingly. His opinion, which overturned Connecticut precedents that an action for breach of express or implied warranties required "evidence of a contract between the parties," highlighted the untrue belief that privity of contract was no longer an essential element of recovery in most jurisdictions.<sup>60</sup> The court furthermore overlooked the fact that the plaintiff-purchaser may have been guilty of contributory negligence in handling of the product. Contributory negligence or intervening negligence is an appropriate defense to a breach of warranty action, as is evident in the *Silverman* case<sup>61</sup> in Connecticut. Although the justice of the situation may be logically commendable, there was no need for the court to dismiss so categorically the prerequisite privity of contract doctrine.<sup>62</sup>

Written disclaimers of liability, if not unconscionable, are in effect express warranties which preclude implied warranties to the contrary. The fact that the "liability without fault" doctrine has been frequently foisted upon the contract theory of implied warranty, prompted many manufacturers and sellers to "contract out" of this kind of blind liability by means of express disclaimers. A disclaimer in strong and specific language would be inconsistent with the warranty, and therefore would bar recovery on breach of such warranty. In the *Vandiver* case<sup>63</sup> the Kentucky court upheld an express disclaimer of liability for mechanical failure of an air compressor. However, in the *Burr* case,<sup>64</sup> the California court held the following disclaimer to be inadequate to bar recovery for damages due to an insecticide spray: "Seller makes no warranty of any kind, express or implied, concerning the use of this product. Buyer assumes all risk in use or handling, whether in accordance with directions or not."<sup>65</sup> But, if

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<sup>60</sup> See authorities cited *supra* note 46.

<sup>61</sup> *Silverman v. Swift & Co.*, 141 Conn. 450, 107 A.2d 277 (1954).

<sup>62</sup> The Connecticut court relied in great measure upon the New York decision in *Greenberg v. Lorenz*, which extended the benefits of warranty to a person other than the purchaser of a food product. Associate Justice Murphy failed to note that the *Greenberg* case did not directly involve the manufacturer of the food product.

<sup>63</sup> *Vandiver v. B. B. Wilson Co.*, 224 Ky. 601, 51 S.W.2d 899 (1932).

<sup>64</sup> *Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954).

<sup>65</sup> Some typical disclaimers are as follows: "This writing . . . constitutes the entire agreement between the parties hereto, there being no warranties or representations by the seller except as set forth herein." *Stryker v. Rush*, 187 N.Y.S.2d 663 (Sup. Ct. 1957).

"We give no warranty, express or implied, as to description, quality, productiveness or any other matter . . . and will be in no way responsible for the (product) . . . and the purchaser hereby waives the right of refusal and return of goods which is usually connected with non-warranty." *Lumbrazo v. Woodruff*, 256 N.Y. 92, 175 N.E. 525 (1931).

"We believe this product to be safe if used under the direction of a physician (or

the disclaimer here had specifically referred to impurities in the spray, there is a likelihood that the California court would have upheld the disclaimer. Incidentally, the famous 1960 *Henningsen* decision<sup>66</sup> in New Jersey, in which an automobile disclaimer was invalidated,<sup>67</sup> was not persuasive to the New York Supreme Court in *Fink v. Oakes*<sup>68</sup> wherein the defendant auto dealer's motion for summary judgment was granted:

The original order signed by plaintiff, immediately above her signature, contains this provision: "Read conditions on back.—It is expressly understood and agreed that this order is given and accepted subject to all conditions on the reverse side, and no other." On the reverse side, the contract includes the following provision: "The manufacturer warrants each new motor vehicle manufactured by it to be free of defects in material and workmanship under normal use and service . . . within ninety (90) days after making delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles . . . ; *this Warranty being*

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in accordance with accompanying directions). We cannot guarantee however that the use of this product will not produce unfortunate results in some persons. This product is sold without warranty, express or implied, against injuries resulting from its use." *Chemical Week* (Feb. 21, 1958) p. 111.

<sup>66</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>67</sup> "Disclaimer clauses like the one in *Henningsen* have been upheld in many jurisdictions: *Nephi Processing Plant Inc. v. Western Co-op Hatcheries*, 242 F.2d 567 (10th Cir. 1957); *Rasmus v. A. O. Smith Corp.*, 158 F. Supp. 70 (N.D. Iowa 1958) (storage bin—no warranties except replacement of defective parts within 60 days); *Donnelly v. Governair Corp.*, 145 F. Supp. 699 (N.D. Cal. 1946) (refrigeration equipment); *Moss v. Gardner*, 228 Ark. 828, 310 S.W.2d 491 (1958) (farm machinery); *Wilson v. Eargle*, 98 Ga. App. 241, 105 S.E.2d 474 (1958) (boat, motor, and trailer); *Columbia Loan Co. v. Parks*, 97 Ga. App. 76, 102 S.E.2d 46 (1958) (disclaimer excluded all warranties except warranties of title); *Allen v. Brown*, 181 Kan. 301, 310 P.2d 923 (1957), (machinery of standard make); *National Trailer Sales Co. v. Pate*, 213 Md. 69, 130 A.2d 747 (1957), ('no warranties expressed or implied' excluded implied warranty of merchantability in contract of sales for a house trailer—leaky roof); *Hall v. Everett Motors Inc.*, 340 Mass. 430, 165 N.E.2d 107 (1960), (auto dealer not liable for fire damage caused by faulty directional lights); *Mullins v. San Scism Motor Inc.*, 331 S.W.2d 185 (Mo. 1960); *Hargrove v. Lewis*, 313 S.W.2d 594 (1958); *Kennedy v. Cornhusker Hybrid Co.*, 146 Neb. 230, 19 N.W.2d 51 (1945), ('we give no warranty express or implied'); *Lumbrazo v. Woodruff*, 256 N.Y. 92, 175 N.E. 525 (1931), ('no warranties extended unless expressly written herein' was held to void implied warranties); *Norton Buick Co. v. E. W. Tune Co.*, 351 P.2d 731 (Okla. 1960) (auto manufacturer's standard disclaimer precluded buyer from rescinding contract on ground of breach of any implied warranty); *Dimoff v. Ernie Mayer Inc.*, 55 Wash. 2d 385, 347 P.2d 1056 (1960); *McDonald Credit Serv. Inc. v. Church*, 49 Wash. 2d 400, 301 P.2d 1082 (1956); *Jones v. Mallon*, 3 Wash. 2d 382, 101 P.2d 332 (1940), (seller makes no representations or guarantees); *Hykand v. G. C. A. Tractor & Equip. Co.*, 274 Wis. 586, 80 N.W.2d 771 (1957), (power shovel)." 46 Cornell L. Q. 617 (1961).

<sup>68</sup> N.Y. Sup. Ct. King's County, Feb. 28, 1961.

*expressly in lieu of all other warranties express or implied* and of all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of its vehicles." (Emphasis supplied.) There is no prohibition against waiving these rights because section 152 of the Personal Property Law specifically states: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, *it may be negatived or varied by express agreement . . .*" (emphasis supplied) and that is just what was done by this plaintiff. . . .<sup>69</sup>

In the typical allergy situation the manufacturer of the product may disclaim liability expressly on the label of the product, to wit: "This product is safe if used in accordance with the notice and the accompanying directions. No guarantee can be given that the use of this product may not produce unfortunate results in some persons. Therefore, no express or implied warranties are given as to freedom from ANY asserted unfavorable effect or result which may be ascribed to the use of the product."<sup>70</sup> It is advisable to preface such a written disclaimer with a general statement or notice that certain individuals, for undetermined reasons, may be allergic or hypersensitive to any product that is harmless to the overwhelming multitude of users. Should

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<sup>69</sup> It has generally been held that a disclaimer or exculpatory clause is enforceable if the statement expressly makes no warranty of any kind except those expressly stated, and that the buyer assumes all risk of liability whatsoever resulting from the use of the material. Today, when it is customary for manufacturers to make express warranties of materials and workmanship for limited periods, it is desirable to include language to the effect that "this warranty (disclaimer) is expressly made in lieu of all other warranties, express or implied, and of all other obligations or liabilities on our part." Hence, the disclaimer disclaims the existence of any express or implied warranties, and if not unconscionable is readily enforceable. See *Charles Lachman Co. v. Hercules Powder Co.*, 79 F. Supp. 206 (E.D. Pa. 1948), and *Shafer v. Reo Motors Co.*, 205 F.2d 685 (3d Cir. 1953). A disclaimer may, however, be applicable only to express warranties, *McPeak v. Baker*, 236 Minn. 420, 53 N.W.2d 130 (1952).

<sup>70</sup> In *Maryland Cas. Co. v. Owens-Illinois Glass Co.*, 116 F. Supp. 122 (S.D.W. Va., 1953) a third party sued a marketer of a drink for injuries sustained when a bottle exploded. The marketer's insurer settled the claim, and, being subrogated, sued the bottle manufacturer, one count being in warranty and the other in negligence. The manufacturer pleaded the contract of sale which contained not only a disclaimer of warranty but a condition that the manufacturer should not, in case of broken or "defective" bottles, "be liable in any event for loss of contents or for special or consequential damages of any kind." As to the warranty count, the court declared: "Not only is there no express warranty, but there is an express provision excluding any warranty. In the presence of such an agreement between the parties, no implied warranty arises." As to the negligence count, it was said: "A party to a contract may limit or disavow entirely liability for his own negligence, insofar as such liability would otherwise accrue to the other party to the contract," the exception to such general rule not being applicable here. A motion by the manufacturer for judgment on the pleadings was granted.

an allergic reaction occur, the user is advised to discontinue use of the product until patch-testing confirms or denies that the given product was the offending allergen. A vendor may also disclaim liability for any warranty expressly or impliedly made by the manufacturer.<sup>71</sup>

The defenses to a breach of warranty action are not limited to those of a contractual origin. Such tortious defenses as contributory negligence by the users,<sup>72</sup> assumption of the risk,<sup>73</sup> unusual or abnormal use of the product,<sup>74</sup> and independent, intervening act of negligence by user or third party<sup>75</sup> are available. Proof of proximate cause is obviously a requisite under negligence or breach of warranty.<sup>76</sup> Should the user not read and follow all the printed material on the label of the product, recovery for injuries is generally barred.<sup>77</sup> Similarly, in the *Natale* case<sup>78</sup> involving injuries from a bursting soda bottle, the New York Appellate Division reversed a \$200,000 judgment for the plaintiff consumer because careless handling of the bottle by the plaintiff between the time of purchase and the time of the accident negated any possible breach of implied warranty of merchantability. In the *Worley* case<sup>79</sup> a waitress in a restaurant had sustained a skin irritation on her hands and arms from use of "Tide," a detergent manufactured by the defendant. On the box of "Tide" was the statement, "Kind to Your Hands." In an action for breach of warranty the Missouri court denied recovery, holding that the injury was the result of an allergy and not of any poisonous substance in the product. The court declared that the burden of proof was on the plaintiff to show

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<sup>71</sup> In *Miller v. Klindworth*, 98 N.W.2d 109 (1959) the North Dakota Supreme Court held that an intermediate vender of seed may, under Sec. 4-0915 of the N.D. Rev. Code, not only rely in good faith upon the label affixed to a container of agricultural seed by a shipper or grower thereof, but in reselling such seed, he is not precluded from disclaiming any responsibility for, or any express or implied warranty under, such label. The disclaimer language was held effective against a claim for damages arising from the seed purchaser's failure to obtain the yield which the purchase should ordinary have produced.

<sup>72</sup> Contributory negligence is good defense in action for breach of implied warranty, *Nelson v. Anderson*, 245 Minn. 445, 72 N.W.2d 861 (1955); *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, 224 F.2d 120 (6th Cir. 1955); also 23 Air & Comm. 108 (1956); 1953 Wis. Rev. 109.

<sup>73</sup> *Alpert v. Head Ski Co.*, 170 N.Y.S.2d 796 (1958).

<sup>74</sup> *Vincent v. Tsikas Co.*, 337 Mass. 726, 151 N.E.2d 268 (1958).

<sup>75</sup> See *Taylor v. Jacobson*, 336 Mass. 709, 147 N.E.2d 770 (1957).

<sup>76</sup> See *Curry v. Great A. & P. Tea Co.*, 67 Ohio L. Abs. 569, 119 N.E.2d 142 (C.P. 1954).

<sup>77</sup> See *Swift & Co. v. Phillips*, 314 S.W.2d 326 (Tex. 1958).

<sup>78</sup> *Natale v. Pepsi Cola Co.*, 182 N.Y.S.2d 404 (Sup. Ct. 1959).

<sup>79</sup> *Worley v. Procter & Gamble Distrib. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952).

that she was a normal person who used the detergent in a normal manner, but that it was still injurious to her skin.<sup>80</sup>

#### A REVISIT TO THREE LEADING CASES

##### *Braun v. Roux Distributing Co.*<sup>81</sup>

One of the extreme cases which has been wholly misunderstood by both bench and bar is the *Braun* case, decided by the Missouri Supreme Court in 1958. The product involved was a standard hair tint of the oxidation type, which constitutes perhaps 95% of all hair colorings sold on the market today. Some 60 million American women color their hair. This product contained less than one-tenth of one percent of a coal tar derivative (known as PPD), which is admittedly a sensitizer to a susceptible person. The Federal Food, Drug & Cosmetic Act has since 1938 required the product to bear a cautionary label.<sup>82</sup> By its terms the label calls for a preliminary patch or skin test for hypersensitivity 24 hours before each and every application of the product. The plaintiff after her 20th application suddenly ascertained that she was suffering from "a very rare and unusually fatal malady" known as periarteritis nodosa, an inflammatory disease of the arteries.<sup>83</sup> Admittedly, according to the court, "the cause of the disease is unknown," and both sides conceded that "there has never been either a reported or an established case of periarteritis nodosa caused by allergic reaction to paraphenylenediamine hair dye . . . . There are of course no comparable cases,<sup>84</sup> this being the first instance in the history of law or medicine of periarteritis nodosa caused by allergic reaction to paraphenylenediamine."<sup>85</sup> There was uncontra-

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<sup>80</sup> The evidentiary rule of *res ipsa loquitur* in a negligence action is *not* applicable where the circumstances surrounding the injury are not of such a character as to warrant the conclusion, that in the ordinary course of events, such injury would not have occurred if ordinary care had been observed. See *Schafer v. Wells*, 171 Ohio St. 506, 172 N.W.2d 708 (1961); *Glowacki v. Northwestern Ohio R. & P. Co.*, 116 Ohio St. 451, 157 N.E. 21 (1927); *Reckman v. Keiter* 109 Ohio App. 81, 164 N.E.2d 448 (1960); *Krysiak v. Acme Wire Co.*, 169 F. Supp. 576 (N.D. Ohio 1959); and *Krupar v. Procter & Gamble Co.*, 160 Ohio St. 489, 117 N.E.2d 7 (1954).

<sup>81</sup> 312 S.W.2d 758 (Sup. Ct. Mo. 1958).

<sup>82</sup> Section 601(2) of the Federal Food, Drug & Cosmetic Act as amended. 21 U.S.C. 361, 52 Stat. 1054 (1938).

<sup>83</sup> See *Pirring v. Weisbrod*, 39 Pa. D&C 196 (1940), and *Schilling v. Roux Distr. Co.*, 240 Minn. 71, 59 N.W.2d 907 (1953). See *Jiggetts v. Figueroa*, 21 Misc. 2d 280, 199 N.Y.S.2d 789 (1959) on duty of beauty salon to make patch or skin test, and *Neely v. St. Francis Hospital*, 188 Kan. 546, 363 P.2d 438 (1961) on failure of hospital to make skin test.

<sup>84</sup> According to the court, ". . . because of the difficulty of accurate diagnosis, most of the cases were identified and diagnosed by autopsy."

<sup>85</sup> Again, according to the court, "Some known, or said to be known, causes



dicted evidence<sup>86</sup> that some 75 million applications of the product had been made without a single known case of this systemic injury. There was no evidence or even a suggestion of any test that might have disclosed the likelihood of plaintiff's malady.

Yet on this record the Missouri court affirmed a judgment in favor of the plaintiff in the final amount of \$65,000. Indeed, the court lashed out with its invidious doctrine of liability without fault, despite the absence of any negligence on the part of the product manufacturer. The warnings given by the defendant could hardly be deemed insufficient<sup>87</sup> for the cautionary statement complied fully with the requirements of federal law.<sup>88</sup>

To have demanded that the defendant give a *further* warning to this plaintiff of unknown but possible systemic injury was the height of futility and foolishness. Indeed, no one including the defendant (and also the plaintiff) could have known *beforehand*<sup>89</sup> that plaintiff could have

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of the disease—some of the witnesses said that the definite cause has never been stated—are drugs, kidney infections, serums of all kinds, blood transfusions, sulpha drugs, penicillin, and phenobarbital.”

<sup>86</sup> On the important issue of admissibility of evidence, the Missouri court stated that medical articles concerning paraphenylenediamine (the alleged toxic ingredient in the hair tint which allegedly caused plaintiff to become afflicted with periarthritis nodosa) had no probative value in that the medical cases reviewed in the articles were not shown to have been in any way similar to plaintiff's use of defendant's tint. But nevertheless, these articles were admitted in plaintiff's behalf, because the articles were not offered as substantive proof of the fact of truth of their contents, but upon the essential element and theory of plaintiff's case that the defendant knew or should have known of the unreasonable risk and foreseeable danger of serious systemic injury to some people from the use of paraphenylenediamine in its hair dye.

<sup>87</sup> The distributor (and manufacturer) was not permitted to object to the trial court's manner of interpretation to the jury of the book of instructions as a matter of law (rather than as a matter of fact), since they failed to take exception thereto in the trial court, and also because it appeared that at the time of the trial both parties were of the opinion that the question was one of law for the court. Proof of the harmful ingredients in the bottle causing the harm was not required of the plaintiff, strange as it may seem.

<sup>88</sup> Note that in *Phillips v. Roux Laboratories*, 286 App. Div. 549, 145 N.Y.S.2d 449 (1955), the adequacy of the patch test instructions was upheld: “Just as failure to comply with a statute and regulations promulgated thereunder is evidence of negligence, full compliance therewith is some evidence of the exercise of due care in preparing and publishing instructions for the guidance of consumers in the use of hair dye preparation containing a coal-tar product.”

<sup>89</sup> Since the early case of *Runyan v. Price*, 15 Ohio St. 1 (1864), the Ohio Supreme Court has held that the opinion of a witness must relate to the time about which the witness is being examined. See *Scaglioni v. Oriti*, 83 Ohio App. 351, 83 N.E.2d 657 (1948). An analogous approach as in *LaPorte v. U.S. Radium Corp.*, 13 F. Supp. 263 (D.C.N.J. 1935) should have been taken. This case involved radium necrosis suffered by a luminous watch dial painter, where the court very carefully noted that the case

contracted periarteritis nodosa after use of defendant's product. It is difficult to understand how compliance with the federal labeling requirements as to coal tar hair dyes can afford any protection to the manufacturer, if a state court can, without statutory notice, add to the federal requirements and impose liability upon general principles of a *greater* duty to warn than prescribed for *all* such hair colorings by federal law.

The Missouri Supreme Court in 1958 talked about "fair compensation in view of the nature, extent and permanency of the injuries."<sup>90</sup> Mrs. Braun received a \$65,000 judgment—and yet in July 1962, upon information and belief, she resided in a newly purchased home in North St. Louis, a healthy, active housewife with two children, who each Wednesday bowled, was active in a neighborhood bridge club and did her own housework and wash!<sup>91</sup>

*Wright v. Carter Products*<sup>92</sup>

The U.S. Court of Appeals for the Second Circuit in 1957 in the *Wright* case ruled that, despite the susceptible plaintiff's allergic reaction to the underarm deodorant, the manufacturer was liable "in negligence for failure to discharge that duty (to warn) by inserting appropriate words of caution" in the labelling of the product. The federal court opined that such "liability is rightly borne as one of the costs of production and selling a commodity for use by members of the public, whose knowledge of the potential danger to themselves may be greatly inferior to that possessed by the manufacturer."<sup>93</sup> Here exactly 373 complaints had been received by the manufacturer about his deodorant product, the sales of which exceeded 82 million jars. In the *Merrill* case<sup>94</sup> (where no liability was found), out of 500 million packages of permanent wave lotion sold by the entire industry, only two cases of the allergic optic neuritis had been even reported. Thus, the *Wright* case can only be understood as an instance of imposed *statutory* liability based upon two Massachusetts statutes which prohibit false advertising and misbranding. Yet what evidence of statutory violation was there other than that misconstrued by

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had to be decided on the fact as they existed in the light of the scientific and medical knowledge of 1917 to 1920 when decedent was injured, rather than in the light of the rapidly advanced scientific knowledge existing later at the time of the law suit.

<sup>90</sup> *Braun v. Roux Distr. Co.*, *supra* note 81, at 768.

<sup>91</sup> Yet the court had characterized the plaintiff: "She has not been cured—Mrs. Braun has been very ill and may continue to be."

<sup>92</sup> 244 F.2d 53 (2d Cir. 1957).

<sup>93</sup> *Id.* at 59.

<sup>94</sup> *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (10th Cir. 1956).

by the court in noting the Federal Trade Commission order 5 years after the plaintiff had commenced to use the product?

To substantiate its decision in reversing and remanding the case, the court held that the date of the allergic accident was the date of last use, not the prior date of the onset of the allergy, and despite the fact the plaintiff sustained a rash upon a prior use, her subsequent use which resulted in another allergic response was with legal impunity—no contributory negligence was averred. Indeed, how speculative it is to argue that plaintiff would have heeded a warning if a warning were given! Plaintiff was aware of the risk in the subsequent use of the product.

On the charge of negligent advertising of the product, the plaintiff submitted no proof of reliance upon such representations. Despite the lack of any evidence that the manufacturer was negligent in the manufacture of the product, the court quietly skimmed over the trial court's finding of fact that "the injury suffered by the plaintiff was the result of her own allergy rather than being caused by any inherent defect in the product itself." The court completely overlooked, on the issue of foreseeability of an allergic reaction, the 1956 decision of its federal district court in *Cumbert v. Household Research Corp.*<sup>95</sup> There was no judicial basis whatsoever for the court's indulgence in a "presumption that the defendant was aware of the possibility of injury from the use of its product," and the manufacturer's "status as an expert in the formulation and use of chemicals for deodorant purposes" is *de minimis* when compared with plaintiff's awareness of her own *prior* allergic response to the product.

*Crotty v. Shartenberg's—New Haven, Inc.*<sup>96</sup>

A directed verdict for the retailer of hair remover was set aside and a new trial ordered by the Supreme Court of Errors of Connecticut, despite the higher court's admission that directions for its use made it known to the purchaser that it could injuriously affect one who might be allergic to some substance or ingredient contained in it. According to the court:

Authorities agree that a buyer who, having a unique or peculiar sensitivity, suffers injury from some innocent substance should not be entitled to recover damages from the seller. . . . The medical profession had made an extensive study of allergies. It has found that the human body may become sensitized to a substance so that,

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<sup>95</sup> 145 F. Supp. 782 (D. Mass. 1956).

<sup>96</sup> 147 Conn. 460, 162 A.2d 513 (1960). Cf. *Gordon v. Clairol Incorporated*, 22 Conn. Super. 209, 166 A.2d 209 (1960).

upon exposure to it, there is a bodily reaction which results in one or another of the allergic disturbances. It is common knowledge that eggs, strawberries, fish, and other products in common use, as well as the pollen of certain flowering plants or shrubs, will produce allergic reactions in some people. The sale of an article or product in its natural state may cause an allergic reaction, but the seller should not be held liable under the law of implied warranty unless there is some inherent defect in the product sold. A warranty of reasonable fitness must be construed in the light of common knowledge with reference to the nature of the article or product sold. *Silverman v. Swift & Co.*, 141 Conn. 450, 457, 107 A.2d 277. A warranty of this kind does not mean that the goods can be used with absolute safety or that they are perfectly adapted to the intended use, but only that they shall be reasonably fit therefor. *Cavanaugh v. F. W. Woolworth Co.*, 308 Mass. 423, 426, 32 N.E.2d 256.<sup>97</sup>

In spite of this pronouncement the court concluded, without a scintilla of evidence, that the manufacturer's recommended patch or skin test for hypersensitivity to be made prior to the application of the depilatory "is not always efficacious," and "there were facts from which the jury could have found that "Nudit" contained an ingredient which had a tendency to produce an injurious reaction in persons allergic to it, that the plaintiff was one of an appreciable number of persons who could be injuriously affected by its use, and that her injuries were caused by a breach of implied warranty."<sup>98</sup> The complete turnabout of the court is incredible, especially since the lower trial court had directed a verdict for the defendant.

#### THE FEDERAL HAZARDOUS SUBSTANCES LABELING ACT

On July 12, 1960, by approval of President Eisenhower, the Federal Hazardous Substances Labeling Act became law, effective February 1, 1961.<sup>99</sup> This statute imposes criminal penalties for failure to warn

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<sup>97</sup> *Id.* at 466, 162 A.2d at 516. The facts showed: "The plaintiff asked the sales girl at the cosmetic counter in the defendant's store for a good hair remover, without specifying any brand. The clerk sold her a hair remover called Nudit, a preparation contained in a tube which was packed, together with a tube of finishing cream, in a cardboard box. Under the directions on the box and on the tube of Nudit, the user whose skin was supersensitive was, on the first occasion, to make a test in accordance with instructions in a booklet enclosed in the box." *Id.* at 461-462, 162 A.2d at 514.

<sup>98</sup> *Id.* at 468, 162 A.2d at 517.

<sup>99</sup> The effective date of the enforcement provision was extended to Aug. 1, 1961 (and then to Feb. 1, 1962) except for products which are highly toxic, extremely flammable, and flammable. Extensions of time have also been given for other provisions of the statute.

Penalties include fines up to \$500 imprisonment up to 90 days, or where there is intent to defraud and mislead \$3,000 and 1 year respectively. The law also provides for

of the hazards of certain household chemical products in the use or storage about the home. If the product is "hazardous," i.e., it is toxic, corrosive, contains an irritant or a strong sensitizer, is flammable, radioactive (if named by regulation), or is packaged in a pressure container, the container must bear a warning label, identifying the hazard and the hazardous ingredients, and also giving advice on precautionary and first aid measures.

Under Section 2(f) "hazardous substance" is defined, among other definitions, as a substance or mixture of substances which is a "*strong sensitizer*," provided that it may cause "substantial injury or illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children." The standard for determining what is a "strong sensitizer"<sup>100</sup> is in theory, at least, that standard which is generally recognized at common law in civil liability cases relating to the seller's duty to warn users of the hazards of his products.<sup>101</sup> But, in practical logic, by virtue of FDA's own definition of a "strong allergic sensitizer," the product manufacturer or seller becomes an insurer of his product against every eventuality, including an allergic response in a susceptible individual user, provided that a "substantial number"<sup>102</sup> of individuals experience the "allergenic sensitization." Indeed, the strict liability doctrine again rears its ugly head,<sup>103</sup> although the product is not defective nor unreasonably dangerous to persons other than the allergic few.

The Secretary of Health, Education & Welfare under Regulation Section 191.6 has already determined and designated certain sub-

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injunctions. It is similar to the Food, Drug, and Cosmetic Act in its provisions for factory inspection, sample collection, publicity, and coverage of imports.

<sup>100</sup> Under Regulation 191.1(i) a "strong allergic sensitizer" is defined as "a substance that produces an allergenic sensitization in a substantial number of persons who come into contact with it." This FDA Regulation continues: "An allergic reaction ordinarily does not develop on first contact because of necessity of prior exposure to the substance in question. The sensitized tissue exhibits a greatly increased capacity to react to subsequent exposures of the offending agent. Thus, subsequent exposures may produce severe reactions with little correlation to the amounts of the excitant involved."

<sup>101</sup> A manufacturer or vendor is ordinarily liable for latent defects, if there is reason to believe that he should have discovered the defect. See *Thomas v. Jerominik*, 170 N.Y.S.2d 388, 8 Misc. 2d 517 (Sup. Ct. 1957).

<sup>102</sup> According to Food Chemical News of August 7, 1961, the FDA advisory panel of six dermatologists endorsed FDA's definition of "strong sensitizer" and commented that "a strong sensitizer" causes sensitization in one or more persons in 10,000 population, or less, if the sensitization is severe. It is incredible that the FDA could designate a "strong sensitizer" under these terms without conducting tests on 10,000 individuals, which testing the FDA cannot afford in time or in money.

<sup>103</sup> See generally Dickerson, "Recent Developments in Food Products Liability," 8 Prac. Law. 17-36 (April 1962).

stances<sup>104</sup> as "strong sensitizers" meriting "Warning" or "Caution" labeling. One of these substances is *oil of bergamot* which is rarely if ever sold as a household item.<sup>105</sup> The Essential Oil Association, after surveying its membership about its use and experience with oil of bergamot, reported that with an industry use of 75,000 lbs. annually, there was no adverse experience:

Fortunately there are some good articles published such as the one by Dr. Ed Masters in the New York State Medical Journal. This paper showed a summary of a major cosmetic company's experience on complaints. It represented 113 plus million units sold in 18 different cosmetic categories. The average number of reactions were 0.4 per 100,000 units. In the case of colognes and perfumes which would be expected to have the highest percentage of perfume oil, the reactions were .02 per 100,000 units. Certainly this would seem to be far less than one reaction in 10,000 individuals, since this represented sales over a number of years.<sup>106</sup>

Another substance designated by the Secretary is *paraphenylenediamine* or PPD, the coal tar derivative upon the oxidation of which the coloring action of permanent hair tint depends. This listing of PPD as a strong sensitizer (the incidence of hair dye sensitivity is perhaps one out of 150,000 persons)<sup>107</sup> must be construed with reference to the so-called exemption under Sec. 2(f)(2) of the Act for foods, drugs, and cosmetics which are under the Federal Food, Drug and Cosmetic Act. A hair tint which is not *adulterated* under Sec. 601 of the FFD&C Act, nor *misbranded* under Sec. 602 of the FFD&C Act, may become *misbranded* under the FFD&C Act, if that hair tint "offers a substantial risk of injury or illness from any handling or use that is customary or usual." And the reason behind the FDA threat is that the hair tint's "label fails to reveal material facts with respect to consequences that may result from the use of the article when its label fails to bear information to alert the householder to this hazard."<sup>108</sup>

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<sup>104</sup> "(a) Paraphenylenediamine and products containing it. (b) Powered orris root and products containing it. (c) Epoxy resins systems containing in any concentration ethylenediamine, diethylenetriamine, and diglycidyl ethers or molecular weight of less than 200. (d) Formaldehyde and products containing 1 percent or more of formaldehyde. (e) Oil of bergamot and products containing 2 percent or more of oil of bergamot."

<sup>105</sup> "It is inconceivable that any household product might contain 2% or more of bergamot." American Perfumer (October 1961), p. 32.

<sup>106</sup> *Id.* at page 33.

<sup>107</sup> See Reiss, Gahweiler & Lustig, "Sensitivity to Hair Dyes," J. of Allergy 28:134-141 (1957). Also, Reiss, "Contact Dermatitis: A Survey of its Incidence." 116 Dermatologica 419-425 (1958).

<sup>108</sup> Note Paragraph 191.61 of Regulations published in Federal Register of August 12, 1961: "Exemptions for food, drugs, cosmetics. (a) Food, drugs, and cosmetics.

Such a hair tint presently carries a caution statement<sup>109</sup> on its label and is therefore *not* adulterated. But the FDA, working surreptitiously and without industry consultation, has drafted proposals for amendments, including a new Sec. 605 and the removal of the coal tar hair dye exemption under Sec. 601(a) of the FFD&C Act. As a result, the Federal Hazardous Substances Labeling Act has been subverted from a statute limited to "household chemical" products which cannot be sold unpackaged and which from their nature must be in a container in order to be handled or used,<sup>110</sup> to a statute embracing within its bureaucratic arms the vast cosmetic and beauty industry of the United States.

Interestingly, the Act, while requiring precautionary labeling, does not provide that a known hazard be the subject of a warning. There is no duty to remind the consumer of something he or she should or already knows: "When a dangerous condition is fully obvious and gen-

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Substances subject to the Federal Drug and Cosmetic Act are exempted by section 2(f)(2) of the act; but where a food, drug or cosmetic offers a substantial risk of injury or illness from any handling or use that is customary or usual it may be regarded as *misbranded* under the Federal Food, Drug and Cosmetic Act because its label fails to reveal material facts with respect to consequences that may result from use of the article (21 U.S.C. 321(n)) when its label fails to bear information to alert the householder to this hazard." (*Italics added.*)

<sup>109</sup> *Supra* note 84.

<sup>110</sup> Commissioner George P. Larrick in a statement before the Senate Committee on Interstate and Foreign Commerce on S. 1283 illustrated those household products which should be regulated under the new Act: "A number of dry cleaning preparations for rugs, upholstery, and other fabrics contain volatile materials that are toxic not only by ingestion but also by inhalation. One of these ingredients, carbon tetrachloride, has been widely used as a spot and stain remover in the home and as an ingredient in home fire extinguishers. Although industry for years has been well aware of the toxic nature of carbon tetrachloride and has devised safeguards to protect workers who must use it, this knowledge has not extended to the home. Household users have suffered serious damage to their liver and kidneys, and fatal injuries from inhaling fumes of carbon tetrachloride while cleaning rugs and other household items. Detergents for cleaning, washing, and water softening frequently contain highly alkaline chemicals capable of causing serious burns. Metal cleaners and polishes and rust removers have been on the market with such toxic ingredients as cyanide, hydrofluoric acid, fluosilicic acid and methylene chloride. Each of these chemicals has caused injury to home users. The cyanides in particular have caused a number of deaths over the years. Furniture polishes may contain ingredients, including kerosene oil, which are extremely toxic if swallowed. Being attractively scented and colored, they are often swallowed by children when left within reach and have been responsible for many deaths. Household bleaches contain chlorine compounds that are quite toxic when swallowed. Injuries to children from these bleaches are a common experience in most of the poison control centers throughout the country. Paints, paint removers, brush cleaners, and accessory products have caused injuries in the home over a period of years. These are just a few examples of the types of household products whose labeling is not now regulated under the Federal law. These materials require better regulation to safeguard those in the home."

erally appreciated, nothing of value is added by a warning."<sup>111</sup> Indeed, since there is no product under the sun to which some person at some time is not sensitive, it is arguable that a precautionary warning of a possible allergic response is not at all necessary. But a warning of a possible allergic response can be meaningful and will be observed by the consumer, if such warnings are restricted to those products containing only the *strongest* sensitizers.<sup>112</sup> Otherwise, an unnecessary warning of the alleged hazard weakens the impact of necessary warnings of unknown hazards.<sup>113</sup>

### SOME PROCEDURAL PROBLEMS

Procedurally, two paramount problems center about disclosure of prior complaints, and disclosure of product formula. These procedural weapons in the hands of plaintiff have frequently coerced product manufacturers into settlement of doubtful claims. Yet legal research should have convinced the manufacturer that data on prior complaints and on product formulae are beyond the reach of the allergic plaintiff, *unless and until a proper foundation has been laid*.

In 1959 a federal court in Illinois,<sup>114</sup> upheld the manufacturer's objections to certain interrogatories calling for disclosure of the number, names and addresses of complainants because the question was vague and too broad. The same court refused to give the allergic consumer the name of the ingredients that may cause skin irritations because the question *assumed* that the product did contain harmful ingredients, which was not proved.

The New York Supreme Court has stated the exclusionary rule:

Evidence of prior accidents is admissible if the conditions under which the prior accidents occurred were the same. . . . Where the

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<sup>111</sup> 2 Harper and James, *The Law of Torts*, (1956), p. 1542 and p. 1546. Par. 28.5 and Par. 28.7.

<sup>112</sup> "The term 'strong sensitizer' means a substance which will cause on normal living tissue through an allergic or photodynamic process a hypersensitivity which becomes evident on reapplication of the same substance and which is designated as such by the Secretary. Before designating any substance as a strong sensitizer, the Secretary, upon consideration of the frequency of occurrence and severity of the reaction, shall find that the substance has a significant potential for causing hypersensitivity." Sec. 2(K), 15 U.S.C. § 1261(k).

<sup>113</sup> See Section 2(p) of the Act, 15 U.S.C. § 1261(p), as to the pattern of precautionary labeling, *i.e.*, the appropriate signal word. "Danger," "Warning," or "Caution"; affirmative statement of the hazard; statement of the precautionary measures to be followed or avoided; instructions for handling and storage of packages requiring special care in handling or storage; the statement "Keep Out of reach of Children" or its practical equivalent; and label bearing name and address of manufacturer, packer, producer, or seller.

<sup>114</sup> *Burns v. Clairol Incorporated*, D.C.N.D. Ill. decided Nov. 25, (1959).



conditions are not similar, such evidence is inadmissible. The questions here concern accidents occurring under conditions and at places completely dissimilar and are therefore irrelevant.<sup>115</sup>

*Similar conditions* in a claim for allergic injuries must take into account these *minimal* facets: (a) precisely the same product; (b) use of product in strict accord with the instructions accompanying the product; (c) age and sex of complainant; (d) prior exposure to sensitizing substances; (e) manner of use or application of the product; and (f) reasonable period of time involved.

In the event that a court in its discretion admits evidence of prior, similar accidents, the admissibility is limited to the showing of *notice* to the product manufacturer of the danger of the product.<sup>116</sup> As the New York Appellate Division opined: "The mere happening of an accident is not in and of itself proof of negligence nor proof of freedom from contributory negligence."<sup>117</sup>

Disclosure of formulae or trade secrets is another weapon in the arsenal of the allergic consumer to harass the product manufacturer into a favorable settlement. But the courts have generally stood firm in protecting this property right of the manufacturer,<sup>118</sup> and have erected these four protective barriers: (1) proof of materiality or relevancy of the requested composition information to the plaintiff's allegations of injury;<sup>119</sup> (2) proof of absolute necessity or indispensability of obtaining such information to allow plaintiff to make out his cause of action and proceed with his burden of proof;<sup>120</sup> (3) proof that the product is "poisonous," "inherently deleterious," or "defective"<sup>121</sup>;

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<sup>115</sup> York v. Shaer (N.Y.L.J. Sept. 10, 1959).

<sup>116</sup> See Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

<sup>117</sup> Kaplan v. City of New York, 6 App. Div. 489, 179 N.Y.S.2d 885 (1960).

<sup>118</sup> Taylor v. Hoffman, 118 N.Y. 30, 34 (1889); Glick v. McKesson & Robbins Inc., 10 F.R.D. 477 (D.W.D. Mo. 1950).

<sup>119</sup> See Wagner Mfg. Co. v. Cutler-Hammer, Inc., 10 F.R.D. 480 (S.D. Ohio 1950); Hollywood Shoe Polish Co. v. Knowmark Mfg. Co., 20 Misc. 2d 367 (Sup. Ct. 1960).

<sup>120</sup> See Melori Shoe Corp. v. Pierce & Stevens Inc., 14 F.R.D. 346 (D. Mass. 1953). Cf. Bleacher v. Bristol-Myers Co., 163 A.2d 526 (Super. Ct. Del. 1960) and Fibron Products, Inc. v. Hooker Chem. Corp., 206 N.Y.S.2d 659 (Sup. Ct. 1960).

<sup>121</sup> In Procter & Gamble Dist. Co. v. Vasseur, 275 S.W.2d 941 (1955), the Court of Appeals of Kentucky declined to compel the manufacturer to disclose the exact proportions or percentages of the ingredients of the product, holding same to be trade secrets, unless and until "it shall be shown by the evidence that the use of a large proportion of any one of the ingredients used in the ingredients used in the manufacture of the soap powder 'Cheer' would have an injurious effect upon the skin of its users." Obviously, a product is not "defective" even if it is a dangerous article, provided that it was properly made. "Defective" means simply "improperly made."

and (4) proof that the requested composition information is not obtainable in any other manner.<sup>122</sup>

Probably the leading case against disclosure of product composition data is *Drake v. Hermann*,<sup>123</sup> decided by the New York Court of Appeals almost thirty years ago. Judge Lehman found that the plaintiff had failed to show that the data requested as to composition was not otherwise available, and refused to allow any disclosure of the information whatsoever. In 1948 the New York Appellate Division, First Department, specifically cited the *Drake* case as still controlling, and refused to reveal defendant's trade secrets upon pretrial examination of the defendant.<sup>124</sup> In *Gehm v. Countess Maritza Cosmetic Co.*<sup>125</sup> plaintiff moved to examine defendant before trial as to the "component" parts of a deodorant. The New York Supreme Court denied the motion by referring to "the secrecy of property rights (which) may be endangered." In 1951 in *Levy v. Roux Distributing Co.*<sup>126</sup> the New York Appellate Division, First Department, unanimously declared:

No appellant shall be required in making such statement or on such examination, to disclose any formula or manufacturing process used in the production of its products.<sup>127</sup>

Numerous federal court opinions also support the holding in *Drake v. Hermann*. In *Lenerts v. Rapidol Distributing Co.*<sup>128</sup> the federal district court, despite the admittedly liberality of Federal Rules 30(a) and 30(b) on discovery and inspection, held: "It is improper to require the defendant to reveal a secret formula or trade secret in a case of this nature." In *Glick v. McKesson & Robbins, Inc.*<sup>129</sup> the federal district court found only the ingredients of the sun-tan oil to be relevant to the factual issues of the case, and in strong language unconditionally refused to allow disclosure of "proportions" of such ingredients.

The New York Appellate Division in *Hyman v. Roux Distributing*

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<sup>122</sup> In *Drake v. Hermann*, 261 N.Y. 414, 185 N.E. 685 (1933) the highest New York court declared: "If analysis will divulge all the ingredients but not the process of manufacture, plaintiff cannot be said to have a right based upon necessity to examine the defendant respecting the presence of these ingredients."

<sup>123</sup> *Supra* note 122.

<sup>124</sup> See *Kaplan v. Roux Distr. Co.*, 273 App. Div. 865, 76 N.Y.S.2d 601 (1948): "The plaintiff has made no showing of necessity for an examination that may reveal trade secrets, nor that the information cannot be obtained otherwise."

<sup>125</sup> 196 Misc. 785, 95 N.Y.S.2d 754 (Sup. Ct. 1949).

<sup>126</sup> 279 App. Div. 611, 107 N.Y.S.2d 585 (1951).

<sup>127</sup> Note that in *Levy v. Roux Dist. Co.*, *supra* note 126, the Appellate Division modified the order of the trial court as to disclosure of ingredients by permitting defendants to submit a written statement as to ingredients and samples of the product.

<sup>128</sup> 3 F.R.D. 42 (D.N.D.N.Y. 1942).

<sup>129</sup> 10 F.R.D. 477 (W.D. Mo. 1950).

*Co.*<sup>130</sup> took occasion to describe at length the meaning of its order. It limits the "examination to 'ingredients' of the product and does not include a requirement that appellant disclose its formula. Such formula is a property right which should not be disclosed save in case of urgent necessity. There is no reason for such disclosure."

In the *Vasseur* case<sup>131</sup> the highest Kentucky court upheld the manufacturer's refusal, in good faith, not to name the exact proportion of ingredients in the soap product which allegedly caused injuries to the arms and legs of the user. To require disclosure in such instances would result in needlessly giving away of valuable trade secrets which should be safeguarded. The court also refused to allow the plaintiff to conduct a "fishing expedition" with respect to prior complaints received by the defendant.

If plaintiff contends that the ingredients or substances in the product were *toxic*, the mere demand for disclosure of ingredients will not be honored, unless there is competent proof of toxicity of those substances, for such proof of toxicity is an indispensable prerequisite to a direction that defendant disclose whether they are present in its preparation.

#### CONCLUSIONS

The growing but unwarranted concept of "liability without fault" in the field of products liability has prompted the manufacturer of the product (and all managers of consumer product businesses) to reach out and meet the problem with understandable responsibility. It can readily be shown that today the average manufacturer has adopted higher standards of care in the manufacture and distribution of his product. He has sensibly endeavored to maintain higher standards of truth in advertising his product, and to minimize any possible misleading representations about the efficacy of the product. Such enlightened business manufacturers have adopted liberal *modi operandi* to satisfy the complaining consumer—cash refunds, product exchanges, and even admission of liability for nuisance value purposes. The increase in the number of products liability insurance policies in force reflects concern for the welfare of the consumer market.

From the purely medical point of view, the dermatologist has great difficulty in understanding why courts assess liability against a manufacturer, distributor, or vendor of a product to which a given plaintiff is peculiarly susceptible. Dr. Frederick Reiss in an address before the Society of Medical Jurisprudence, New York Academy of

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<sup>130</sup> 100 N.Y.S.2d 937 (App. Div. 1950).

<sup>131</sup> *Procter & Gamble Dist. Co. v. Vasseur*, *supra* note 121.

Medicine, in February 1959, expressed his personal incredulity in these words:

Certain individuals are far more responsible for an allergic reaction than is the causative agent. Who is responsible for the hives that may follow the eating of a bowl of strawberries? Is it the grocer who sold the strawberries? The farmer who grew them? If the lobster eaten at a good restaurant causes a reaction, does the fault lie with the restaurant, the lobster fisherman or even with the U.S. Government from whose waters the lobsters were taken?

It is my view that if the responsibility is to be placed, then the greatest fault is that of the parents whose chromosome pattern caused the predisposition of an individual's allergy traits. The fault cannot lie with the manufacturer or distributor. Moreover, since the dermatitis following an allergic response is usually self-limiting—naturally when the use of such a cosmetic is eliminated—claims for injury are, it seems to me, not in proportion to the proper responsibility of the manufacturer.

After reviewing important dermatological aspects of allergic reactions, including the existence of cross-sensitization, Dr. Reiss concluded by asserting that what is required is:

. . . a recasting of the attitudes of lawyers and the courts. The responsibility of the manufacturer for the quality of his product is a continuing factor, but must he be held responsible for the altered from the normal, differing reaction of the user? Allergic responses are of course due to the sensitizing nature of substances themselves, but also to individualistic responses by the complex human being.<sup>132</sup>

The problem facing bench and bar today in the field of allergic responses is insoluble, unless the potential liability is reasonably limited. An equilibrium must be found which will encourage caution but will not impose unrealistic burdens upon the manufacturer, distributor, and retailer. Liability, whether in tort or in contract, must first be tested as a matter of law by the court. If there is no possible liability in law (for the defendant has violated no legal obligation), the matter should be summarily dismissed. "Liability without fault" is not a doctrine which the American economy can or will accept, especially where facts and circumstances dictate otherwise. The allergic response is, at most, a temporary discomfort sustained by a hypersensitive individual using a product which is ordinarily harmless to the average person. Where the consumer product has precautionary labeling, the failure of the complainant follow such "commonly used precautions prevailing among the general public"<sup>133</sup> should bar relief.

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<sup>132</sup> Drug and Cosmetic Industry, April, 1959, p. 435.

<sup>133</sup> Indeed, a majority of jurisdictions hold that if the article sold can be used by a normal person without injury, there is no breach of the implied warranty of

For the courts to hold otherwise would surely lead to economic chaos in all fields of industry.<sup>134</sup> Every farmer, every fisherman, every fruit grower, even the Almighty who produces humanity, dust, cold or the warm air, and other natural phenomena, could be held liable for reactions of those few hypersensitive individuals. Surely the law must be sensible, realistic and worthy of respect in logic and experience.

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reasonable fitness, *Flynn v. Bedell Co.*, 242 Mass. 450, 136 N.E. 252 (1922); *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (1952); *Barrett v. S. S. Kresge Co.*, 144 Pa. Super. 516, 19 A.2d 502 (1941); *Stanton v. Sears Roebuck & Co.*, 312 Ill. App. 496, 38 N.E.2d 801 (1942); *Zager v. F. W. Woolworth Co.*, 30 Cal. App. 2d 324, 86 P.2d 389 (1939); *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (10th Cir. 1956); and *Graham v. Jordan Marsh Co.*, 319 Mass. 690, 67 N.E.2d 404 (1946). In these cases the injured party was described as one who suffered from a peculiar or unique susceptibility to harm from the article or product sold; or, he was found to have a peculiar sensitivity or unusual bodily condition unknown to the seller.

<sup>134</sup> Perhaps the so-called Tennessee rule, as applied in *Spencer v. Cutter Laboratories*, U.S.D.C., N.D. Calif., Aug. 15, 1956, should be given universal application. Here U.S. District Court Judge Murphy dismissed the counts charging breach of warranty against the defendant manufacturer who sold the vaccine in California and shipped it to Tennessee where it was sold by a Tennessee distribution to a Tennessee doctor who injected it into plaintiff causing the alleged injuries. Judge Murphy applied the Tennessee rule that actions for causing injury by manufacturing or distributing noxious substances for human consumption must be based upon negligence alone, and may not be brought under a warranty theory or any other theory of liability without fault.